Supreme Court, U.S.
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No. 99-326

In The
Supreme Court of the United States

AMALGAMATED TRANSIT UNION, and
ATU LOCAL 1700,
Petitioners.

vs.

CARL E. NIEHAUS,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the Court of Appeals, Ninth Circuit decision at variance with Petitioners' cited decisions from two other Circuits?

2. Were Niehaus' state law claims based on interpretation of the collective bargaining agreement, and if so, did Niehaus disavow reliance on that agreement for the first time on appeal?

4. Must a court consider only the complaint, and not anything else after the complaint is submitted, in deciding whether a state claim is preempted?

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STATEMENT OF THE CASE

The Unions (ATUI and Local 1700) are attempting to appeal a Court of Appeals, Ninth Circuit affirming of a district court's remand of pendent state claims with the argument that those claims should be preempted by labor law.

Niehaus makes the following principal counter arguments in support of his contention that the Petition for Writ of Certiorari should be denied:

(1) The Ninth Circuit decision is not at variance with Petitioners' cited decisions from two other Circuits;

(2) The state law claims were not based on interpretation of the collective bargaining agreement;

(3) Niehaus did not disavow reliance on the collective bargaining agreement for the first time on appeal; and

(4) Petitioners are wrong in their argument that a court may consider only the complaint, and not anything else after the complaint is submitted, in deciding whether a state claim is preempted.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE THIRD AND ELEVENTH CIRCUITS, NOR WITH THE U. S. SUPREME COURT.

Contrary to Petitioners' contentions, the Ninth Circuit's decision **does not** conflict with those of the Third and Eleventh Circuits in *Malia v. RCA Corp.*, 794 F.2d 909 (3rd Cir.1986), *cert. denied*, 482 U.S. 927 (1987) and *Redmond v. Dresser Indus., Inc.*, 734 F.2d 633 (11th Cir. 1984), **nor is it inconsistent** with *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

Allis-Chalmers is readily distinguishable from the Niehaus case. Lueck was a union member (*Id.* at 203); Niehaus was not a union member. Lueck's complaint required interpretation of the labor contract because it depended upon whether the employer's conduct breached an implied labor contract provision. (*Id.* at 214 and 220).

Niehaus' state law claims do not involve breach of the labor contract, nor do they rely on an interpretation of the labor contract, as confirmed in the findings of both the Federal District Court and the Court of Appeals, Ninth Circuit decisions. The *Allis-Chalmers* holding does not contradict the *Niehaus* holding.

Redmond v. Dresser Indus., Inc., 734 F.2d 633 (11th Cir. 1984) is also readily distinguishable from the Niehaus case. Redmond, like Niehaus, was not a union member at the times relevant to his state claims, but Redmond was not suing his employer on any separate contract; he was suing on the basis of his employer's failure to adhere to the terms of the labor contract. (*Id.* at 635).

Again, Niehaus' state law claims do not involve breach of the labor contract, nor do they rely on an interpretation of the labor contract, as one can see in the findings of both the Federal District Court and the Court of Appeals, Ninth Circuit decisions. The *Redmond* holding does not contradict the *Niehaus* holding.

Malia v. RCA Corp., 794 F.2d 909 (3rd Cir.1986), *cert. denied*, 482 U.S. 927 (1987) supports the *Niehaus* decision in the Ninth Circuit. In *Malia* the court found that "Malia's Complaint also alleges facts that would support a claim for breach of an oral contract." (*Id.* at 912).

> "Thus, because we construe Malia's Complaint as alleging a state-law breach of contract claim based on an oral employment contract we conclude that that claim and Malia's state-law tort claims, which derive from the breach of the oral contract, are independent of and do not interfere with the Local 178

collective bargaining agreement." (*Id.* at 913).

The *Malia* holding is perfectly consistent with the *Niehaus* holding. In fact its findings, as well as its holdings, read like almost an identical case to the *Niehaus* case.

In summary, Neither *Redmond* nor *Malia* conflict with the decisions below, and furthermore, neither even address the question on which Petitioners seek review. In both cases, a supervisor plaintiff sued his union and his employer over breaches of an alleged promise to permit him to return to the bargaining unit.

In *Redmond* the plaintiff was relying solely on a promise found in the collective bargaining agreement, and the court held his claim preempted.

In *Malia* the plaintiff relied both on the collective bargaining agreement and on a separate oral promise, and the court held the former claim preempted but the latter not preempted.

Both cases are thus entirely consistent with the holding of the District Court and the Court of Appeals, Ninth Circuit on the preemption issue.

II.

THE STATE LAW CLAIMS WERE NEVER BASED ON INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT, AND NIEHAUS DID NOT DISAVOW RELIANCE ON THAT AGREEMENT FOR THE FIRST TIME ON APPEAL.

A. Niehaus Disavowed Reliance on the Interpretation of the Collective Bargaining Agreement During the Federal District Court Proceedings as Shown in the Findings of That Court.

The Unions' principal claim, under QUESTIONS PRESENTED in their Petition to this Court, is that Niehaus"disavowed reliance on the [collective bargaining agreement] for the first time on appeal," that the "complaint alleges state-law claims that require interpretation of the labor contract," and that plaintiff is attempting to "evade pre-emption under Labor Management Relations Act §301 by disavowing reliance on the labor contract on appeal." (Pet. Cert. at page *i*).

On the contrary, Niehaus disavowed reliance on the labor contract with respect to his state claims before the Federal District Court, and that court, in its remand order of 9/30/97 found as follows:

> " ... plaintiff argues that he has claims that are separate and

> independent of the collective bargaining agreement. He claims that a separate contract existed between himself, Greyhound, and the unions that he would be able to return to a job in the bargaining unit regardless of the terms of the bargaining agreement. (Pet. Cert. at Apdx. B37).

B. Also, Niehaus Did Not Indicate Reliance on the Collective Bargaining Agreement with Respect to His State Claims in the First Amended Complaint.

Niehaus' Third through Sixth, and Eighth Causes of Actions became his remanded state law claims. (Pet. Cert. Apdx B-111 through B114, ¶¶120-133 and ¶¶137-139)

Each of these causes of actions relates to the separate promissory contracts between Niehaus and the Greyhound and Union defendants which assured Niehaus that he could transfer from management to a union level, working position and rejoin the union.

Not one of these state law causes of actions in the First Amended Complaint made any reference to the collective bargaining agreement.

Furthermore, If we examine the "Enumeration of the Facts Underlying This Complaint" (starting at Pet. Cert. Apdx B-95) in Niehaus' First Amended Complaint, we find that it explains that Niehaus first checked with a union official (Russ Buell) to investigate whether or not the collective bargaining agreement provided for union membership reinstatement with seniority or, on the other hand, presented any obstacle to union membership reinstatement. He learned that the collective bargaining agreement seniority clause did not apply to him any longer (since he had been in management more than two years), and that the agreement did not present any obstacle to rejoining the union. (Pet. Cert. at Apdx B-97, ¶22 &24).

Niehaus wisely did not resign until after he was assured by Greyhound management (Dennis Bishop) and by a union official (Russ Buell) that they would each cooperate in shifting him from management to a union member working position. (Pet. Cert. Apdx B-97, ¶ 22).

These were critical promises for Niehaus, because he needed to be certain that he would have employment continuity in order to safeguard his pension, and also to further contribute to it during his final working years.

A fair reading of the state causes of actions and the factual narrative presented in the First Amended Complaint reveals that Niehaus

complained about a promissory contract for continued employment completely independent of the collective bargaining agreement.

III.

THERE IS ALSO NO CONFLICT WITH THE THIRD AND ELEVENTH CIRCUITS, NOR SUPPORT FOR PETITIONERS' CONTENTION THAT A FEDERAL DISTRICT COURT CAN CONSIDER ONLY THE COMPLAINT IN DECIDING WHETHER OR NOT TO REMAND STATE CLAIMS.

Petitioners are simply wrong in arguing that a court may consider only the complaint, and not anything said after the complaint if submitted. It is true that the question of whether removal is proper is to be decided based on the complaint (subject of course to the well-pleaded complaint doctrine).

But it is also clear that a party may affect the decision of the District Court whether to undertake a discretionary remand of a state law claim. Thus in *Carneigie-Mellon v. Cohill*, 484 U.S. 343 (1988) the U.S. Supreme Court responded to the expressed concern that plaintiffs might manipulate the process by dropping federal-sounding parts of their claims in order to secure a remand, not by saying that such a tactic could or should never succeed in obtaining a remand, but rather by urging the lower courts to exercise their

discretion to deny a remand when it appeared that the plaintiff was being manipulative.

Here, the District Court chose to accept plaintiff's characterization of his state claims, stated in the complaint, as not relying at all on language in the collective bargaining agreement.

In both *Redmond* and *Malia* the courts discussed those plaintiffs' claims by reference to the complaint and the arguments made in district court or appellate briefs, and the arguments could have been considered in deciding how to characterize those plaintiffs' claims, and thus whether to hold the claims preempted.

Nor for that matter, was there any discussion of this question in *Allis-Chalmers*.

The opinion of the Court of Appeals below is devoid of any discussion of this supposedly pressing procedural question that is so vital that Petitioners urge it as a basis for the Court's adding this case to its docket.

In short, the decision below does not conflict with any case referred to by Petitioners, or of which we are aware.

CONCLUSION

1. The Ninth Circuit's holding does not conflict with those of the Third and Eleventh Circuits.

2. Niehaus' state law claims were not based on interpretation of the collective bargaining agreement.

3. Niehaus did not disavow reliance on the collective bargaining agreement for the first time on appeal as Petitioners' claimed. (Pet. Cert. 16).

4. Niehaus' First Amended Complaint itself does not base his state claims on interpretation of the collective bargaining agreement.

5. Petitioners' provided no authority to back up their claim that a Federal District Court can consider only the complaint in deciding whether or not to remand state claims.

The Petition for Writ of Certiorari should be denied.

DATED:

Respectfully submitted,

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